

REVIEW ARTICLE JUDICIAL ETHICS IN AUSTRALIA

GEORGE WINTERTON*

Judicial Ethics in Australia, by THE HON. MR JUSTICE THOMAS. (The Law Book Company Limited, Sydney, 1988), pp.i-xxxii, 1-126. Cloth recommended retail price \$25.00 (ISBN 0 455 20782 8).

I.

The judiciary has long been a popular subject for scholars and commentators in the United States and the last few years have seen a similar trend develop in the United Kingdom, Canada and Australia. Now, in addition to the valuable histories, biographies and political science-oriented monographs already published on the High Court and other Australian courts, we have the first detailed Australian study of judicial ethics, written by Mr Justice James Thomas of the Supreme Court of Queensland.

This succinct, well-researched and clearly written little book, which is addressed largely to judges (hardly surprising since it is derived from a paper presented at a Supreme Court Judges' Conference in 1987), advocates the formulation of a code of judicial ethics and urges judges to begin the task of formulating appropriate standards of judicial behaviour, for which the book could undoubtedly provide the foundation. The code should prescribe only general precepts; Mr Justice Thomas insists that "the very worst thing that could be done would be to prepare a list of specific prohibitions".¹

In general, he finds the American Bar Association's seven Canons of Judicial Conduct a useful model. They are appended to the book, as are Sir Matthew Hale's eighteen wise precepts for judicial behaviour. Like those Canons, the Australian code should not be obligatory but should serve both

*LL.B. (Hons), LL.M. (WA) J.S.D. (Columbia). Associate Professor of Law, University of New South Wales.

¹ Mr Justice Thomas, *Judicial Ethics in Australia* (1988), 93.

as a guide for judges and as a public statement of "the restraints and disciplines which judges voluntarily impose upon themselves".²

Does Mr Justice Thomas establish the necessity for such a code of conduct, which many of his colleagues are likely, at best, to find irksome? The Chief Judge of the Land and Environment Court of New South Wales, for example, has already greeted the proposal without great enthusiasm,³ as has a New Zealand High Court judge, who has warned of the difficulty in actually formulating such a code.⁴

The author's argument for a code of judicial ethics is based primarily on the ground that it would assist in restoring public confidence in the judiciary which, in his opinion, has declined in recent years and consequently would keep 'outside interference' in the form of judicial commissions at bay. The analogy with industry arguments for self-regulation inevitably springs to mind. The author's forthright approach is evident from the beginning:

[t]here was no apparent need for a study such as this in the comfortable days which lasted until a few years ago. It was the steep drop in public respect for the judiciary over the last three years that has changed the scene.⁵

He attributes this decline to the public disquiet caused by the allegations and consequent proceedings against Mr Justice Lionel Murphy of the High Court of Australia, Judge John Foord of the New South Wales District Court and former New South Wales Chief Magistrate Murray Farquhar, especially the first.

These incidents probably did reduce public confidence in the judiciary for a time, especially in New South Wales, although reliable statistics appear to be absent. However public memory is notoriously brief, so whether public confidence remains depressed, especially outside New South Wales, may be questioned as it is by Mr Justice Pincus in the Foreword to this book. If public confidence has declined, however, only ethical behaviour by judges will restore or maintain it, and the public is unlikely to be impressed by the adoption of codes of judicial ethics, about which they are unlikely to know or even care. Hence, this reviewer would question, with respect, the author's argument that "[i]f the public understood the restraints and disciplines which judges *voluntarily* impose upon themselves, there would be no call for outside interference".⁶

However, although the author's principal ground for advocating a code of judicial ethics may be questioned, the merits of endeavouring to formulate agreed standards of judicial conduct to guide both judges and the public

2 *Ibid.*

3 Mr Justice J.S. Cripps, *State of the Judiciary* (unpublished speech for First Canada-Australasia Law Conference, Canberra, 7 April 1988) 19: "[a]lthough I favour the establishment of a body to deal with complaints about judges I am less enthusiastic about the creation of a code of judicial ethics which attempts exhaustively to cover judicial conduct."

4 Mr Justice M. Hardie Boys, *Review of Judicial Ethics in Australia* (1988) NZLJ 235, 236.

5 Note 1 *supra*, 1.

6 *Id.*, 93. Emphasis added.

appear so obvious that his conclusion stands independently of the reasons upon which it is based.⁷ Hence, a work such as this would have been appropriate and welcome whether or not the Murphy, Foord and Farquhar incidents had occurred. Shimon Shetreet's masterly study of judicial behaviour in England was not, after all, occasioned by any particular judicial scandal.⁸

II.

Mr Justice Thomas establishes clearly that judges constantly face important ethical issues in both their official and private lives, and his book examines several of these.

Questions arising out of official conduct include prejudice, bias and unfairness, neglect of duty, attacks upon other judges, 'headline hunting', and adjudication of cases in which the judge has a personal interest. The author's treatment is interesting and is illustrated with appropriate examples. The remarkable case of Judge Leland Geiler of Los Angeles Municipal Court is fortunately included.⁹

Extra-judicial conduct raises ethical questions of greater complexity and the author's discussion of some of these is particularly valuable, especially since few of them have been addressed directly in Australia before. The wide range of subjects discussed includes judges acting as character witnesses (preferably only upon subpoena) or referees; comment by judges on public issues (strongly disfavoured);¹⁰ involvement in extra-judicial activities such as educational institutions (acceptable), sporting bodies (questionable) and commissions of inquiry on non-legal or judicial subjects (disfavoured); use of official letter-head; frequenting of public places such as hotel bars; behaviour on circuit;¹¹ business and political activity; sexual behaviour; and appropriate post-retirement occupation. Several of these issues have since been discussed further in a paper the author presented to the subsequent Supreme Court Judges' Conference in Brisbane in January 1988.¹²

It would be inappropriate here to review Mr Justice Thomas' views on these important ethical issues. Suffice it to note that, viewing the present, or at least recent, high level of public respect for the judiciary from the historical

⁷ But this view is certainly not held unanimously. Peter Russell, for example, "remains somewhat sceptical about the wisdom of endeavouring to substitute a codified set of rules for the good judgment of the judiciary": P. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987) 88. However, with respect, this sets up a straw person for attack. The proposed code of ethics would assist and guide judicial 'good judgment', not replace it.

⁸ S. Shetreet, *Judges On Trial. A Study of the Appointment and Accountability of the English Judiciary* (1976).

⁹ Note 1 *supra*, 25-27.

¹⁰ For a similar perspective, see the interesting article by Sir Daryl Dawson, "Judges and the Media" (1987) 10 *UNSWLJ* 17, especially 22.

¹¹ See further Mr Justice J.B. Thomas, "Epistle From a Judge on Circuit" (1987) 10 *UNSWLJ* 173.

¹² Mr Justice Thomas, *Judicial Conduct (Select Topics)* (1988, unpublished).

perspective that "in the field of judicial ethics we are not long out of the woods",¹³ he adopts a high and rather severe standard of judicial propriety. For him, "the ultimate basis of accountability" for both official and non-official conduct is maintenance of "public confidence in the judiciary and the judicial process".¹⁴ Thus he unhesitatingly concurs with the sensible conclusion of Commissioners Lush, Blackburn and Wells that private non-criminal behaviour can constitute "misbehaviour" warranting removal,¹⁵ deriding the opposite view, which commended itself to some eminent counsel during the Murphy affair, as "sheer nonsense".¹⁶

The author's high standard may be illustrated by referring to his views on two subjects, sexual activity and use of official letterhead.

On the former he remarks:

[p]romiscuity is not a criminal offence, but a judge who continually flouted community standards of sexual morality to the extent that it became a public scandal may well reach the position that members of the public would have little confidence in his sitting in judgment on them. In such a situation misconduct or misbehaviour could be found against the judge. There can be little confidence that a judge is applying and upholding community standards if he privately flouts them. . . .

Whilst some transgression may be tolerable, the borderline would be reached if the judge persists, after due warning, in engaging in conduct which a significant portion of the public would regard as outrageous.¹⁷

Although some may see this standard as too severe,¹⁸ this reviewer would not dispute it, recognizing of course that the critical question will be on which side of the line conduct is seen to fall in any particular case. But the author's counsel that judges use their own stationery when writing character references will possibly be seen by many as going too far toward perfection. However it should be noted that the author himself sees this as a question of prudence rather than ethical propriety.¹⁹

III.

Mr Justice Thomas has very clear views on the enforcement of judicial propriety. Removal of judges should remain the sole prerogative of Parliament, although implemented by the Executive, but Parliament should

13 Note 1 *supra*, 74. Cf. *Terrell v. Secretary of State for the Colonies* [1953] 2 QB 482, 495 *per* Lord Goddard C.J.: "So accustomed are we in this country nowadays to the exceptional position occupied by the judges of the supreme court that we are apt perhaps to forget that their independence is comparatively modern in the long history of our law."

14 Note 1 *supra*, 32.

15 *Id.*, 11-13. (The Constitutional Commission agreed: *Final Report of the Constitutional Commission* (1988), vol. 1, paras 6.183-6.187.)

16 *Id.*, 11.

17 *Id.*, 12-13, 58.

18 Cf. David Pannick, *Judges* (1987) 102-103: "Judges are responsible for interpreting and applying the law. They are not moral guardians to the community. It is therefore wrong that a judge can be required to resign for lawful practices of which the majority of people may morally disapprove."

19 Note 1 *supra*, 61. Accord Thomas, note 12 *supra*, 16, 20-21.

not endeavour to ascertain the facts itself or through one of its committees, as occurred at early stages of the Murphy affair. Rather, it should delegate that task to a commission of inquiry comprising sitting or retired judges:

[i]t is now *unthinkable* that on any future occasion Parliament would proceed to its final determination without the benefit of the views of judges of good repute and competency.²⁰

The appointment for this purpose of a commission of inquiry comprising three retired Supreme Court judges in the final stages of the Murphy saga²¹ was, in the author's opinion, "impeccable".²²

Two issues regarding the constitution of such a commission of inquiry are whether it should include sitting judges and whether non-judicial members could, or even should, be included. As already noted, Mr Justice Thomas would not necessarily confine judicial membership of such a body to retired judges. This position is taken also by the Constitutional Commission's Advisory Committee on the Australian Judicial System²³ and the Judicial Officers Act 1986 (NSW),²⁴ under which one of the three members of the Conduct Division, all of whom must be "judicial officers", may be retired. However, it does seem inappropriate for sitting judges of the same jurisdiction and especially of the same or an inferior court to sit in judgment on one of their colleagues.²⁵ It would surely be preferable for the judicial members of the Commission to be retired judges rather than magistrates or, if thought necessary, sitting judges from another jurisdiction (a feature favoured by the author).

Both the Constitutional Commission's Advisory Committee and the Judicial Officers Act 1986 (NSW) confine membership of the commission of inquiry to judicial officers.²⁶ But the commission envisaged by Mr Justice Thomas would not necessarily be exclusively judicial and could include "a selected Member of Parliament or of a parliamentary committee . . . , although such a person or persons should not form the majority".²⁷ Although perhaps initially surprising, on reflection this view has much to commend it,

20 Note 1 *supra*, 10. Emphasis added.

21 See the Parliamentary Commission of Inquiry Act 1986 (Cth).

22 Note 1 *supra*, 99.

23 Report (22 May 1987) para. 5.62: "There is no justification for leaving the responsibility to retired judges". (But it should be noted that the Committee recommended an Australia-wide Judicial Tribunal.) The Constitutional Commission agreed, and recommended a constitutional amendment requiring the Judicial Tribunal to comprise three serving judges of a superior federal court other than the High Court, or a State or Territory Supreme Court: Report, note 15 *supra*, paras 6.199-6.200, 6.203, 6.213.

24 Section 22(2).

25 Under the Judicial Officers Act 1986 (NSW), as Sir Harry Gibbs has noted, "in theory a conduct division hearing a complaint against a Supreme Court judge could consist entirely of three magistrates". Sir Harry Gibbs, "Who Judges the Judges?" (1987) 61 *Law Institute J.* 814, 815.

26 Report, note 23 *supra*, para. 5.60; Judicial Officers Act 1986 (N.S.W.) s. 22(2). (The Advisory Committee's recommendation was endorsed by the Constitutional Commission: see note 23 *supra*.)

27 Note 1 *supra*, 95.

for it would ensure that at least one Member of Parliament would be in a position to explain the Commission's findings to his or her parliamentary colleagues. It is submitted that it could also be appropriate, depending perhaps on the nature of the allegations and whether specialist expertise is required on the Commission, for the Commission to include one non-judicial, non-parliamentary member, whether or not legally trained.

IV.

The other great issue relating to judicial accountability is whether judges should be accountable to some official body for alleged misconduct not serious enough to warrant removal. Notwithstanding a sharp division of informed opinion on this question, Mr Justice Thomas has no doubt whatever that the answer is a resounding no. He outlines briefly the "alarming"²⁸ American experience in this area, especially the operation of the California Commission on Judicial Performance which was established in 1960, notes its growing number of complaints feeding an ever-expanding bureaucracy, and wants none of it here. Such bodies are "a forum for dissatisfied litigants"²⁹: "[i]f judges are presented as an available target, it is inevitable that many people will roll up for a shot".³⁰ He regards the American experience as completely inapplicable in Australia, where the judiciary is not elected and enjoys a high level of public respect. No one could accuse him of 'beating about the bush':

[t]he judicial commissions have become something of a juggernaut in the United States, with growing bureaucracies which engage in self-promotion and which generate a new system of jurisprudence and an enormous quantity of non-productive litigation. . . . There are now organizations to organise the commissions (themselves growing with increasing staffs). There is litigation against the commissions themselves . . . There is a self-promoting derivative industry. . . . They are self-perpetuating and expensive institutions that do not seem capable of clearing up the problems with which they were created. . . .

Australia has no need of these bureaucracies. They are a direct erosion of judicial power and run counter to the trust upon which our judicial system works. . . . Such a system tends to put a judge in a position of siege and it undermines judicial independence.³¹

Abhorrence of such bodies is, indeed, a principal motive for the author's advocacy of a code of judicial ethics.³² Needless to say, he is not enamoured with the Judicial Officers Act 1986 (NSW)³³ insofar as it provides for investigation of 'minor' complaints not serious enough to justify parliamentary consideration of removal but nevertheless capable of affecting "the performance of judicial or official duties".³⁴

28 *Id.*, 89.

29 *Id.*, 87. Accord 89, 90.

30 *Id.*, 89.

31 *Id.*, 89-91. (Citations omitted).

32 *Id.*, 85, 93.

33 *Id.*, 91.

34 S. 15(2)(b).

The author certainly has strong supporters, including the Constitutional Commission's Advisory Committee on the Australian Judicial System, which reached a "firm conclusion" to the same effect after a more balanced assessment of the pros and cons of the establishment of such a body.³⁵ But the New South Wales system also has supporters among the Judiciary, including Mr. Justice Cripps, the Chief Judge of the Land and Environment Court and an *ex officio* member of the Judicial Commission of New South Wales;³⁶ while Sir Harry Gibbs, former Chief Justice of the High Court, appeared to be undecided on the issue last year.³⁷ It is probably still too early to assess the work of the New South Wales Commission, which has as yet presented only two reports to Parliament.

Notwithstanding the vehemence of the author's argument and the admittedly worrying and unwelcome direction of American developments, this reviewer was not, with respect, wholly convinced. The position is certainly not as one sided as his treatment suggests, but this may merely reflect the fact that the book is partly a 'call to arms' directed to judges.

In analysing the issue of accountability for impropriety not serious enough to warrant removal, a sensible starting point is the following observation of Peter Russell, a Canadian supporter of bodies like the New South Wales Judicial Commission:

[s]ociety is inadequately protected from judicial misconduct if the removal process is the only way of sanctioning judges. . . . If a judiciary is to be reasonably accountable to the society it serves, there must be ways and means of responding to complaints other than the "death penalty" of removal. As universities have found with tenured professors, if removal is the only sanction there will frequently be no effective response to legitimate complaints. . . . [T]he aim [of "this intermediate range of remedies"] is to ensure that those who enjoy security of tenure live up to the standards of professional conduct that justify such a privilege.³⁸

Mr Justice Thomas puts his faith in informal, intra-judicial peer pressure and responds to concerns such as Peter Russell's in rather cavalier fashion:

[i]f the errant judge cannot be persuaded by appeals to decency from his fellows or by the threats or cajolery of his Chief Justice, it is unlikely that the threat of a disciplinary committee is going to change his character or conduct.³⁹

Even if this be conceded, what guarantee is there that the Chief Justice or his colleagues will take up the matter, of which they may well be unaware? Furthermore, if there is a private complainant, will he be satisfied when he does not know what action, if any, has been taken on his behalf? Moreover,

35 *Report*, note 23 *supra*, paras. 5.106-5.111. Accord Hardie Boys, note 4 *supra*, 236. (The Constitutional Commission declined to comment because this was "a matter of policy for the Parliaments and Governments of Australia rather than an issue calling for constitutional amendment": *Report*, note 15 *supra*, para. 6.230.)

36 Cripps, note 3 *supra*, 19.

37 See Gibbs, note 25 *supra*, 817.

38 Russell, note 7 *supra*, 182.

39 Note 1 *supra*, 92-93.

the complaint may, in any event, relate to conduct of the Chief Justice himself. These legitimate concerns need to be addressed.

The problem, of course, is how to enforce judicial accountability for relatively minor transgressions without entering the bureaucratic labyrinth so feared by the author. As Sir Harry Gibbs has aptly noted:

[o]ne naturally recoils from any suggestion that judges should be subject to controls of a bureaucratic kind, and hopes that simplistic and populist solutions will not find favour. On the other hand it must be recognized that the pressure of a judge's peers is not always effective.⁴⁰

Hence it is not surprising to find that, while condemning the New South Wales legislation for "[going] too far in allowing a Conduct Division to investigate minor complaints (that is, those which could not justify removal)",⁴¹ James Crawford, a member of the Constitutional Commission's Advisory Committee, nevertheless concedes that "the case for *formal* judicial control over complaints procedures is strong".⁴² The question is, of course, which formal procedures will ensure accountability without impairing judicial independence and sense of being trusted?

Although it would have been better not to employ sitting "judicial officers" from within the jurisdiction, the Judicial Officers Act 1986 (NSW), which requires that minor complaints be investigated in private,⁴³ may yet prove to have successfully balanced independence with accountability.⁴⁴

This valuable, thought-provoking book will undoubtedly become the *vade mecum* of every Australian judge and magistrate (is that why it is pocket sized?). But those who would read it with profit include a much wider circle.

40 Note 25 *supra*, 817. For a more confident perspective, see Mr Justice Gordon J. Samuels, "Who Judges the Judges?" (unpublished paper delivered at Australian Institute of Political Science public debate, Sydney, 4 November 1986), 8-9, 12.

41 J. Crawford, *Australian Courts of Law* (2d ed. 1988) 59.

42 *Id.*, 71 note 45. Emphasis added.

43 Section 24(3). But, as Sir Harry Gibbs has noted, problems can arise if the Commission publishes its findings: note 25 *supra*, 817.

44 For recent English endorsement of a Judicial Performance Commission, see Pannick, note 18 *supra*, 97, 99-103.